STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: H. Gage, M. Cavanagh, K. Wilder

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

-vs-

DANIEL JESSE GONZALEZ,
Defendant-Appellant.

Supreme Court
No. 120363

Court of Appeals
No. 220715

Saginaw Circuit Court
No. 98-015361-FC

BRIEF ON APPEAL - APPELLEE

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* ORAL ARGUMENT REQUESTED *

MICHAEL D. THOMAS (P23539)
Prosecuting Attorney - Saginaw County

JANET M. BOES (P37714)
Assistant Prosecuting Attorney for Appellee
Saginaw County Prosecutor's Office
111 S. Michigan Avenue
Saginaw, MI 48602
(989) 790-5330

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COUNTERSTATEMENT OF JURISDICTION

The Appellee-People accept Defendant's jurisdictional statement as complete and correct.

COUNTERSTATMENT OF QUESTIONS PRESENTED

I. Where circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of murder - including premeditation, did the facts and circumstances surrounding the beating and strangulation homicide of Carol Easlick provide sufficient evidence for the jury to find the premeditation required for First-degree murder?

Court of Appeals said "YES".

Defendant-Appellant says "NO".

Plaintiff-Appellee says "YES".

II. Was an express agreement with jury instructions, by indicating the defense has no objection, an intentional relinquishment of a known right and therefore a waiver of any claim of error in relation to those instructions, or alternatively, has Defendant failed to show plain error where there was no evidence to support a cautionary accomplice instruction and there was substantial physical and testimonial evidence implicating Defendant?

Court of Appeals said "YES".

Defendant-Appellant says "NO".

Plaintiff-Appellee says "YES".

III. Has Defendant's claim of ineffectiveness based upon a failure to request an accomplice instruction failed to satisfy the requirements necessary to support a claim of ineffective assistance of counsel where there was no evidence to support the instruction and substantial physical and testimonial evidence, apart from that provided by the alleged accomplice, establishing Defendant's guilt?

Court of Appeals said "YES".

Defendant-Appellant says "NO".

Plaintiff-Appellee says "YES".

COUNTERSTATEMENT OF FACTS

Although Defendant has submitted a fairly comprehensive statement of facts, additional facts for clarification or correction are summarized below. Other facts are noted in the argument sections of this brief where pertinent.

Charges and preliminary proceedings

Defendant was charged with first-degree premeditated murder, first-degree Felony murder, first-degree criminal sexual conduct, and arson on March 4, 1998. Following a preliminary examination on March 18, 1998, Defendant was bound over to the circuit court to stand trial on those charges. (1a)

Trial Proceedings & Evidence

The evidence revealed that in the early morning hours of February 14, 1998, the Saginaw Fire Department received a call and responded to a blaze engulfing an apartment. The resident of the apartment, Carol Easlick was found tied, face down, on a bed - her hands and feet bound to the bedposts with electrical cords. Her body, particularly her legs, was severely burned. Easlick's head had a number of gaping wounds and was covered with two plastic bags. The mattress on which she lay was nearly destroyed by a fire that had been set on or under it. Fires had also been started in three other parts of the apartment - on an entertainment center, on a chair and in the kitchen. (56a-58a)

An aluminum baseball bat, the victim was known to keep behind the front door of her apartment, was found near the entrance to the bedroom. (50a-53a, 56a-59a, 101a-102a) A crowbar kept by the

victim in her apartment was found in the bedroom at the foot of the bed. (56a-58a, 102a-103a)

The People's witnesses included:

- friends of the victim who saw or heard from her on February 13th and 14th and noted her fearfulness (104a-115a);
- fire and arson investigators (12a-45a, 216a-218a);
- police investigators and forensic examiners (46a-55a, 83a-103a, 165a-169a);
- the pathologist, who performed the autopsy on Carol Easlick, described her wounds, the evidence that he found and seized, the condition of her body and determined the causes of her death (61a-82a);
- expert witnesses on the DNA evidence from the victim, implicating Defendant, and excluding Couch (83a-97a, 219a-231a);
- friends and acquaintances of Defendant who saw him on the dates in issues or shortly thereafter (116a-128a, 142a-158a, 177a-208a).

Woodrow Couch testified that he spent part of the evening with Defendant on February 13, 1998. Couch also spoke with Defendant several times after the 13th when Defendant made incriminating statements about the victim and how she died several times. (177a-208a) The testimony of Couch, particularly as to his whereabouts most of the night of February 13th and early morning hours of February 14th, was corroborated by his mother and a friend of his mother. (142a-158a)

Defendant was first interviewed by the police on February 20, 1998 - he denied going back to Carol Easlick's after leaving about

8 p.m. with his friend Woodrow Couch. In the first interview, he also denied that he had any kind of sexual relations with Carol Easlick. (165a-169a) After his preliminary examination on March 18, 1998, where there was testimony from Kyle Hoskins that vaginal, rectal and oral swabs from the victim had been sent for DNA analysis, Defendant gave a second statement to police. In his second statement on April 20, 1998, Defendant admitted that he had engaged in consensual vaginal and anal sex with Carol Easlick. He also claimed in the second interview that he and Couch had been at Easlick's together from approximately 7:30 p.m. until he left about 2:30 p.m. In this second interview, Defendant further claimed that Couch remained at Easlick's after Defendant left at 2:30. Defendant understood that Couch was going to have consensual sex with Easlick. (232a-239a)

Jury Instructions

The parties submitted and exchanged written jury instruction requests on May 12, 1999. (4a) On the same date, before closing arguments and final instructions to the jury, counsel met with the trial judge in chambers to discuss the instructions. Afterward, the attorneys had an opportunity to voice any objections or comments regarding the instructions on the record. (1b-2b) The comments at that time indicate, in pertinent part, as follows:

> [THE COURT] The court has had an opportunity to meet with counsel in chambers concerning jury instructions, and I would like to take this opportunity to place your comments and objections on the record
>
> * * * * *

> [MR. KING - THE PROSECUTOR] I had requested in my written requests an instruction on alibi. There has been no evidence on alibi. However, there had been a notice of alibi filed, which is the reason I included that as a request.
>
> [THE COURT] ALL RIGHT. Mr. Cowdry?
>
> [MR. COWDRY - DEFENSE COUNSEL] We -- pursuant to our conversations in chambers, we withdrew our request for the various things Mr. King objected to. And other than the alibi, I find nothing objectionable. (1b-2b)

At the conclusion of arguments and the court's final instructions to the jury, the parties had the opportunity to comment, request, and object to instructions. After one correction, defense counsel indicated that he had no objections to the jury instructions as given by the trial judge. (307a)

Verdict

Defendant was convicted of:

- First-degree premeditated murder;
- First-degree felony murder;
- First-degree criminal sexual conduct;
- Arson of a dwelling. (5a, 308a-312a) (11a, 313a-316a)

Post-trial proceedings

Following his conviction, Defendant filed a claim of appeal. Original and supplemental briefs were filed following a change in appellate counsel. (5a-10a) On June 19, 2001, the Court of Appeals issued an unpublished decision affirming Defendant's First-degree murder conviction and sentence but remanding for the arson and criminal sexual conduct convictions to be vacated. A motion for rehearing was denied. But on November 19, 2002, this Court granted Defendant's delayed application for leave to

appeal. (11a, 317a)

ARGUMENT I

Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of murder - including premeditation. The facts and circumstances surrounding the beating and strangulation homicide of Carol Easlick provided sufficient evidence for the jury to find the premeditation required for First-degree murder.

DEFENDANT'S CLAIM

Defendant-Appellant's first issue on appeal to this Court is that the evidence, even in a light most favorable to the prosecution, did not support a conviction for first-degree premeditated murder beyond a reasonable doubt.

STANDARD OF REVIEW COUNTERSTATEMENT

Review of a sufficiency of the evidence issue requires the court to view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt.[1]

DISCUSSION

A. Sufficiency of Evidence - Scope of Review

Addressing the issue of sufficiency of evidence in *People* v *Nowack*, this Court explained:

> [A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory

[1] PEOPLE v NOWACK, 462 Mich 392, 399-400; 614 NW2d 78 (2000); PEOPLE v WOLFE, 440 Mich 508, 515; 489 NW2d 748(1992), amended 441 Mich 1201 (1992).

proof of the elements of a crime.[2]

It is for the trier of fact to determine what inferences may fairly be drawn from the evidence and what weight is to be accorded those inferences.[3]

B. First-degree Premeditated Murder - Elements and proof

To prove the crime of First-degree murder, the prosecutor must show that:

(1) Defendant caused the death of the deceased victim;

(2) Defendant intended to kill the victim;

(3) this intent was premeditated; and

(4) the killing was deliberate.[4]

The premeditation required for First-degree murder may be found where the defendant had time to take a "second look".[5] And this Court has specifically recognized that:

> [E]vidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look'.[6]

In fact, premeditation can reasonably be inferred from various factors, including:

- the circumstances surrounding the killing;

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[2] NOWACK, supra, 462 Mich at 400.

[3] PEOPLE v HARDIMAN, 466 Mich 417, 428; 646 NW2d 158 (2002).

[4] PEOPLE v ABRAHAM, 234 Mich App 640, 656; 599 NW2d 736 (1999) lv den 461 Mich 851 (1999); MCL 750.316.

[5] See e.g. PEOPLE v KELLY, 231 Mich App 627, 642; 588 NW2d 480 (1998).

[6] PEOPLE v JOHNSON, 460 Mich 720, 733; 597 NW2d 73 (1999)(citation omitted).

- the prior relationship of the parties;

- the character of the weapon used;

- the number and nature of wounds inflicted;

- the acts, conduct and language of the defendant before and after the killing.[7]

C. The facts and circumstances surrounding the beating and strangulation homicide of Carol Easlick supported a finding of premeditation

In the present case, evidence of premeditation supporting Defendant's conviction for First-degree premeditated murder included:

- evidence that Defendant knew the victim and had spent time at her residence on and before the date of the murder (104a-110a, 125a-126a, 140a-141a, 176a-183a, 189a-190a);

- evidence that the victim was nervous and fearful during the time Defendant was seen at her residence shortly before the murder (104a-115a);

- evidence that multiple blows to the victim's head with a hard cylindrical object such as an aluminum bat or crowbar, caused

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[7] See JOHNSON, supra, 460 Mich at 732-733 (combination of circumstances involved in crime can support premeditation, including evidence of manual strangulation); PEOPLE v TILLEY, 405 Mich 38, 44-46; 273 NW2d 471 (1979) (totality of circumstances can support premeditation including intervals of time between possession of weapon and first assault, as well as time between assaults or blows); PEOPLE v HERNDON, 246 Mich App 371, 415; 633 NW2d 376 (2001) (multiple blows suggest premeditation - time to take a second look); PEOPLE v COY, 243 Mich App 283, 316; 620 NW2d 888 (2000)(prior relationship, weapon used, location of wounds); KELLY, supra, 231 Mich App at 642 (methodical actions, stabbing, blunt force injury, attempted manual strangulation); PEOPLE v LEWIS, 95 Mich App 513, 515; 291 NW2d 100 (1980)(evidence of premeditation may be circumstantial and can include ill feelings between victim and defendant).

"six gaping wounds", several skull fractures, occurred while the victim was alive and caused the victim's death (61a, 68a-69a, 72a-75a, 82a-86a);

- evidence that the blows to the victims head occurred before she was face down (77a);
- evidence that manual strangulation - compression of the neck from both sides, breaking the hyphoid bone - was a contributing cause to the victim's death (71a-72a, 75a);
- evidence that the victim was tied spread eagle to her bed, face down, her head covered with plastic bags and the mattress set on fire after her death (33a-37a, 62a-63a, 79a, 86a-89a);
- evidence of concealment with multiple fires intentionally set throughout the victim's apartment, as well as to the bed (16a-17a, 26a-33a, 40a)
- Defendant's statements after the murder, including one indicating that he was at the victim's residence, that he went in her bedroom and then left the bedroom to get a bat, he hit her with it, then tied her up (116a-124a, 189a-190a).

The Court of Appeals in the present case concluded that there was sufficient evidence of premeditation, after noting:

> In the instant case, the evidence demonstrates that the victim suffered extensive wounds to her head, including several skull fractures, as a result of blunt force trauma. In addition, the forensic pathologist who performed the autopsy noted that the victim was manually strangled. Evidence of manual strangulation can be used to infer that the defendant had time to take a 'second look.' *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Further, defendant's actions after the killing suggest premeditation and deliberation; after raping, beating and strangling the victim, defendant used electrical wire to tie her face down to a bed and placed a plastic bag over her head.
>
> Defendant also destroyed the victim's apartment by

> intentionally starting four separate and distinct fires in the apartment's kitchen, living room, rear bedroom, and by igniting the bed where the victim was bound. These actions indicate defendant's careful, methodical and deliberate attempts to dispose of evidence that could implicate him in these crimes…. (314a)

The defense argument that the facts "fit a case of impulsive violent wrath" is not supported by a review of all the evidence and reasonable inferences that may be drawn from that evidence. Rather, the evidence of multiple blows to the head, as well as manual strangulation reveals that Defendant had numerous opportunities to take a "second look". Moreover, the defense assertion that the jury "likely mixed the circumstances of the killing and the after death desecration of the body" is mere speculation contradictory to the facts and the applicable law.

The Court of Appeals applied the correct standard of review to the evidence in the present case and correctly found sufficient evidence to support Defendant's conviction of First-degree premeditated murder.

CONCLUSION

Viewing all of the evidence in this case in a light most favorable to the prosecution, a rational trier of fact could reasonably have found the essential elements of First-degree premeditated murder were proven beyond a reasonable doubt. Therefore, the People respectfully request that this Court affirm the Court of Appeals decision and Defendant's convictions, including his conviction for First-degree premeditated murder.

ARGUMENT II

Express agreement with jury instructions by indicating the defense has no objection, as in the present case, is an intentional relinquishment of a known right and therefore a waiver of any claim of error in relation to those instructions. Alternatively, even under a forfeiture analysis, Defendant has failed to show plain error where there was no evidence to support a cautionary accomplice instruction and there was substantial physical and testimonial evidence implicating Defendant.

DEFENDANT'S CLAIM

Defendant-Appellant's second issue on appeal to this Court is that because the issue of credibility was "closely drawn", the trial court committed reversible error by failing to *sua sponte* give a cautionary instruction on the unreliability of accomplice testimony with regard to the prosecution's key witness, Woodrow Couch, in violation of Defendant's right to a properly instructed jury.

PRESERVATION OF ERROR AND STANDARD OF REVIEW COUNTERSTATEMENT

There is no dispute in this case that the issue of an instruction regarding an accomplice was not preserved by a request or objection. Where an issue is not preserved, it is either waived or forfeited.

A. Failure to preserve claim of error - waiver or forfeiture

Legal rights may be waived by litigants, including criminal defendants.[8] Waiver has been repeatedly described by this Court as:

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[8] See UNITED STATES v MEZZANATTO, 513 US 196, 115 S Ct 797; 130 L Ed2d 697 (1995); PEOPLE v STEVENS, 461 Mich 655, 664; 610 NW2d 881 (2000).

> The intentional relinquishment or abandonment of a known right.[9]

The Court has explained further that:

> One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.' Mere forfeiture, on the other hand, does not extinguish an 'error.'
>
> * * * * *
>
> Forfeited error remains subject to appellate review in limited circumstances.
>
> * * * * *
>
> When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal.[10]

Notably, this Court has also concluded that because counsel has full authority to manage the conduct of the trial and to decide matters of trial strategy, waiver in relation to jury instructions could be effected by the action of defense counsel.[11] Thus, waiver, by a defendant or his counsel acting on his behalf in relation to trial strategy and decisions such as jury instructions, extinguishes any error - leaving no error to review on appeal.[12]

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[9] PEOPLE v RILEY, 465 Mich 442, 448-449; 636 NW2d 514 (2001); CARTER, supra, 462 Mich at 219-220; PEOPLE v CARINES, 460 Mich 750, 762-763 n7; 597 NW2d 130 (1999).

[10] RILEY, supra, 465 Mich at 448-449 (citations omitted).

[11] CARTER, supra, 462 Mich at 218-219.

[12] See UNITED STATES v OLANO, 507 US 725, 733-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993); PEOPLE v HERRON, 464 Mich 593, 606-607 n8; 628 NW2d 528 (2001); CARTER, supra, 462 Mich at 218.

This Court has not specifically addressed whether a general approval of jury instructions by the defense is a waiver extinguishing error and precluding any review on appeal. The People maintain that here, the defense approval of the instructions given by the judge constituted a waiver of any instructional error claim under this Court's decision in *People v Carter,* and under the specific legislative provisions set forth in MCL 768.29.[13]

If there was not a waiver, then review must be for a miscarriage of justice under the plain-error standard applicable where there is a forfeiture. As this Court has recognized forfeiture requires that Defendant show error, that was plain or obvious, that affected substantial rights, and that resulted in a miscarriage of justice. [14]

DISCUSSION

A. Approval of Instructions waives any claim of error

In *People v Mills,* this Court recognized that although a requested jury instruction on theories or defenses must be given when it is supported by the evidence, a trial court is not required to present an instruction on defendant's theory unless the defendant makes a request.[15] Our Legislature has mandated that

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[13] PEOPLE v CARTER, 462 Mich 206, 214-216; 612 NW2d 144 (2000); MCL 768.29.

[14] CARINES, supra, 460 Mich at 763-764. See also PEOPLE v GRANT, 445 Mich 535; 520 NW2d 123 (1994).

[15] PEOPLE v MILLS, 450 Mich 61, 80-81; 537 NW2d 909 modified 450 Mich 1212 (1995).

the trial court instruct the jury on the law applicable to the case.[16] However, in the same statute, the Legislature also specifically addressed the effect of a trial court's failure to instruct the jury on a particular point:

> The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.[17]

A similar and consistent provision is set forth in the court rules under MCR 2.516(C), stating in pertinent part:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection.[18]

Thus, preservation of instructional error is required by statute and court rule. This Court in several prior cases found that a failure to comply with these provisions by lodging an objection to instructions constitutes a waiver of any error.[19] The Court, recognizing these provisions in *People v Carines*, stated:

> The policy underlying Michigan's preservation requirement governs all issues.[20]

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[16] PEOPLE v CORNELL, 466 Mich 335, 341; 646 NW2d 127 (2002); PEOPLE v RODRIGUEZ, 463 Mich 466, 472-473; 620 NW2d 13 (2000); MCL 768.29.

[17] MCL 768.29.

[18] MCR 2.516(C). See also MCR 6.001(D) (criminal procedure provision that civil rules apply unless otherwise specified).

[19] PEOPLE v HARDIN, 421 Mich 296, 322-323; 365 NW2d 101 (1984); PEOPLE v HANDLEY, 415 Mich 356, 360; 329 NW2d 710 (1982).

[20] CARINES, supra, 460 Mich at 767.

However, the *Carines* Court also noted that the statute and court rule do not control where the alleged error is constitutional as in the failure to instruct on an essential element of the offense.[21]

In a more recent case, this Court in *People v Carter*, addressed whether the defendant's convictions should be reversed because the trial court refused the jury's request for the testimony of witnesses, in violation of a court rule. The *Carter* Court found that because defense counsel specifically approved the trial court's instruction to the jury, defendant waived his rights under the rule - the waiver extinguished any error and precluded the defendant from raising the issue on appeal.[22] The Court reasoned that:

> The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. Counsel may not harbor error as an appellate parachute.[23]

The Court in *Carter* noted two cases from the Court of Appeals where the Court of Appeals had found a waiver based upon defense counsel agreement with how the jury would be instructed.[24] The Court also explained and distinguished two of it's earlier decisions based upon the distinction between forfeiture and

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[21] Id.

[22] CARTER, supra, 462 Mich at 208-209, 220.

[23] Id. at 214.

[24] Id. at 214-215.

waiver.[25] In *Carter* the Court also relied upon *United States* v *Griffin*, where the Seventh Circuit concluded that the defendant waived and extinguished any objection to a jury instruction because his counsel affirmatively approved the instruction, while a codefendant's challenge to the instruction was not precluded because the codefendant's counsel, rather than affirmatively approving the instruction, failed to object to the instruction - forfeiting rather than waiving the error so that it was subject to review for plain error.[26]

Although the *Carter* Court also pointed out that the instruction involved did not concern an element of the crime or an affirmative defense[27], the reasoning of the Court should not preclude a finding of waiver when a cautionary instruction or defense theory is in issue, particularly where there is a specific statement of approval indicating that there is no objection to the instructions.

Notably, following this Court's decision in *Carter*, the Court of Appeals has consistently found a general affirmation of

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[25] PEOPLE v SMITH, 396 Mich 109, 110-112; 240 NW2d 202 (1976) (no indication of counsel approving, affirming or acquiescing to the instructions); PEOPLE v HOWE, 392 Mich 670, 678; 221 NW2d 350 (1974) (specific recognition that counsel had no opportunity to affirm or object to the instruction in issue).

[26] CARTER, supra, 462 Mich at 215-216, discussing UNITED STATES v GRIFFIN, 84 F3d 912, 924 (CA 7, 1996).

[27] CARTER, supra, 462 Mich at 217 n11.

instructions waives any claim of error.[28] And in at least two decisions since *Griffin*, the Seventh Circuit case relied on by this Court in *Carter*, the Seventh Circuit has found that defense counsel's general agreement with jury instructions provided by the trial court constitutes a "waiver".[29] Specifically, in *United States v Anifowoshe*, the Seventh Circuit Court of Appeals found that counsel's affirmations indicating agreement with the instructions constituted a waiver. The Court concluded:

> [Defendant's] argument that the affirmations do not rise to an intentional relinquishment, if accepted would create an almost insurmountable standard to proving waiver.[30]

And in *United States v Luis Gonzalez*, Chief Judge Flaum of the Seventh Circuit, also found a waiver in relation to acceptance of instructions.[31] In *Gonzalez*, the Court explained:

> The defendants challenge...the omission in the instructions of a definition for the terms 'prohibited drug' and 'possession.' This challenge has been waived because the defendants accepted the relevant instructions--they affirmatively stated in court, 'No objection.' Such affirmation is an intentional

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[28] See PEOPLE v LUETH, 253 Mich App 670; ___NW2d___(2002); PEOPLE v ORTIZ, 249 Mich App 297, 311; 642 NW2d 417 (2002) lv den 650 NW2d 338 (2002). See also PEOPLE v TRUONG (AFTER REMAND), 218 Mich App 325, 341; 553 NW2d 692 (1996) (relying on MCL 768.29 for finding no error where there was no request for instruction).

[29] UNITED STATES v LUIS GONZALEZ, ___Fd3d___ (No. 01-2357) (CA 7, February 6, 2003) [2003 WL 255401]; UNITED STATES v ANIFOWOSHE, 307 Fd3d 643, 650 (CA 7, 2002).

[30] ANIFOWOSHE, supra, 307 F3d at 650.

[31] LUIS GONZALEZ, supra, (No. 01-2357).

> relinquishment of a right and precludes a party from seeking appellate review.[32]

Thus, the statute and court rule noted above, as well as the waiver doctrine explained in these cases, precludes setting aside a verdict based upon a claim that the trial judge erred in instructing the jury where counsel has affirmed or acquiesced to the instructions given.

B. Accomplices and Special Instructions

1. Accomplice Status

The Michigan criminal jury instructions define an accomplice as a "person who knowingly and willingly helps or cooperates with someone else in committing a crime."[33] This definition is consistent with the general understanding that an accomplice is one who participates in the commission of a crime.[34] Mere presence at the scene or knowledge about a defendant's commission of the crime does not make one an accomplice entitling a defendant to a

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[32] Id. See also UNITED STATES v FULFORD, 267 F3d 1241, 1247 (CA 11, 2001) (statement that proposed jury instruction was acceptable constituted waiver under invited error rule). Compare UNITED STATES v CROWLEY, 318 F3d 401, 414 (CA 2, 2003) (acquiescence is not equivalent to approval or invitation, therefore not waiver).

[33] PEOPLE v ALLEN, 201 Mich App 98, 105; 505 NW2d 869 (1993); CJI2d 5.5.

[34] See PEOPLE v WEST, 56 Mich App 37, 40; 223 NW2d 353 (1974) (accomplice is "particeps criminis" with defendant); Anno: Propriety of specific jury instructions as to the credibility of accomplices, 4 ALR3d 351, sec 1[a](1965); The American Heritage Dictionary of the English Language, p 8 (1978).

special instruction.[35]

2. Cautionary Accomplice Instructions

Special instructions have been developed for use where an accomplice testifies, based upon concerns about the inherent weakness and distrust in accomplice testimony when presented by the prosecution.[36]

Although the possibility for a special accomplice instruction has existed in our jurisprudence since the 1800's, early cases found that the failure to instruct on the testimony of a *particeps criminis,* was not reversible error where no instruction was requested.[37] However, in *People v McCoy,* this Court stated that error requiring reversal "may" be found if a trial court fails to give a cautionary instruction on accomplice testimony, even in the absence of a request for such an instruction, if the case is "closely drawn."[38] Subsequently, in *People v Reed,* the Court clarified *McCoy,* explaining:

> This Court has never established standards for evaluating

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[35] See PEOPLE v HO, 231 Mich App 178, 181-182, 189; 585 NW2d 357 (1998); ALLEN, supra, 201 Mich App at 105; PEOPLE v HOLLIDAY, 144 Mich App 560, 574; 376 NW2d 154 (1985). See also MEDINA v STATE, 7 SW3d 633, 642 (Tex Crim App 1999) (en banc) (presence or cover up not enough to link witness to crime as accomplice) cert den 529 US 1102 (2000).

[36] See PEOPLE v REED, 453 Mich 685, 691-692; 556 NW2d 858 (1996); PEOPLE v MCCOY, 392 Mich 231, 236; 220 NW2d 456 (1974). See also CJI2d 5.6.

[37] See PEOPLE v CONSIDINE, 105 Mich 149, 165; 63 NW 196 (1895); MCCOY, supra, 392 Mich at 236-237, and at 248-249 (Coleman, J. dissenting).

[38] MCCOY, supra, 392 Mich at 240.

> when the failure to instruct sua sponte *requires* reversal. In *People v Atkins*, 397 Mich 163, 243 NW2d 292 (1976), for example, we declined to extend *McCoy* to a case involving an addict-informer. One of the reasons was that defense counsel had thoroughly explored the addict-informer's motivation to lie on cross-examination. Id. at 168, 171-172, 243 NW2d 292. Certainly, it would make little sense to require a judge to caution a jury sua sponte on a witness' motivation to lie when defense counsel has thoroughly explored the witness' motivations. Rather, *McCoy* stands for the proposition that a judge should give a cautionary instruction on accomplice testimony *sua sponte* when potential problems with an accomplice's credibility have not been plainly presented to the jury.[39]

Notably, the language of *McCoy* makes any decision to reverse discretionary by using the term "may" reverse.[40] As the Court in *Reed* pointed out, both *People v Grant*, and *People v McCoy*, declined to create a broad rule of automatic reversal when a court fails to give an appropriate instruction *sua sponte*.[41]

3. Accomplice issue not "closely drawn" where the case does not boil down to a credibility contest

Under *McCoy*, the instructions of a trial court may be found in error where the evidence was "closely drawn" and a cautionary instruction was neither requested nor given.[42] In *McCoy*, the testimony of the accomplice was uncorroborated and the issue of guilt was in essence a credibility contest between the defendant and the accomplice.[43] Thus, cases following *McCoy* have found the

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[39] REED, supra, 453 Mich at 692-693 (emphasis in original).

[40] See GRANT, supra, 445 Mich at 542.

[41] REED, supra, 453 Mich at 692 n9. See also MCR 769.26.

[42] MCCOY, supra, 392 Mich at 240.

[43] Id. at 238-239.

evidence "closely drawn" where the trial becomes a credibility between the testifying accomplice and the defendant.[44] Where the testimony of the alleged accomplice is corroborated by other testimonial or physical evidence, the Court of Appeals has also found the issue of guilt is not "closely drawn", and the trial court was not obligated to give an accomplice instruction absent a request.[45]

4. Other Jurisdictions

Jurisdictions differ as to when a cautionary instruction may be required.[46]

The federal courts have not taken a consistent approach to the necessity for an instruction on accomplice testimony and generally view giving of an accomplice instruction as discretionary.[47] Where a defendant had not requested an instruction, many older cases simply found the failure to give such instruction did not constitute plain error.[48]

State courts are similarly mixed in their view of the

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[44] See PEOPLE v TUCKER, 181 Mich App 246, 256; 448 NW2d 811 (1989); PEOPLE v JACKSON, 97 Mich App 660, 666; 296 NW2d 135 (1980); PEOPLE v WORDEN, 91 Mich App 666, 684; 284 NW2d 159 (1979); PEOPLE v HALL, 77 Mich App 528, 531; 258 NW2d 547 (1977).

[45] PEOPLE v BUCK, 197 Mich App 404,415-416; 496 NW2d 321 (1992) Modified on other grounds 444 Mich 853 (1999).

[46] See 75A Am Jur2d Trial, sec 125 (2002).

[47] Id. See also Anno: Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial, 17 ALR Fed 249 (1973).

necessity for an accomplice instruction and the effect of a failure to give such an instruction. For example, a discretionary approach to giving a cautionary accomplice instruction — without any requirement or analysis for a special circumstances warranting an instruction *sua sponte* - has been taken by the Supreme Court of Florida.[49] Similarly, in Georgia, where the defendant does not request an accomplice instruction, there is no requirement to instruct.[50] In contrast, California, although requiring a trial court on its own motion to instruct on the law of accomplices where there is sufficient evidence that a witness is an accomplice, will not reverse for a failure to instruct on the issue if a review of the entire record reveals sufficient evidence of corroboration.[51]

C. An agreement with jury instructions by indicating there is no objection is a waiver, and even if it is merely a forfeiture - there is no plain error where there is no evidence supporting a cautionary accomplice instruction

In the present case, the defense affirmation or acquiescence to jury instructions as provided by a trial judge is a waiver of any claim of instructional error. Because a waiver extinguishes any error - there is no error left for review on appeal. By approving the instructions, first, after a conference and review of proposed instructions and again, after instructions

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[48] Anno, supra, 17 ALR Fed 249, secs 2[a], 4[b].

[49] DENNIS v STATE, 817 So2d 741, 751 (Fla 2002). See also UNITED STATES v JONES, 425 F2d 1048, 1056 (CA 9, 1970).

[50] SCOTT v STATE, 243 Ga App 334; 533 SE2d 428, 430 (2000).

[51] PEOPLE v FRYE, 18 Cal4th 894; 77 Cal Rptr 2d 25; 959 P2d 183,

were read to the jury, Defendant waived a known right to request different or additional instructions, or to object to the instructions. Defense counsel specifically indicated that he found nothing objectionable and had no objection. (1b-2b, 307a) This was more than a mere failure to object, it was a specific affirmation.

The fact that a defense theory or a key witness whose credibility may be important is at issue should not change the analysis as to waiver, for if any of those issues are involved Defendant is not left without a remedy. A cautionary instruction related to a theory or defense that a reasonably competent attorney would have pursued and requested, and that would make a difference in the outcome, would support an ineffective assistance claim that, if established, would result in a new trial.

Alternatively, assessing Defendant's claim under a forfeiture analysis does not entitle him to relief. Defendant simply cannot show that his substantial rights were affected to the degree that a miscarriage of justice resulted by the fact that the accomplice instruction was not given. A substantial amount of evidence apart from the testimonial evidence of the alleged accomplice implicated Defendant. (12a-245a) The jury was also specifically instructed on credibility issues applicable to all witnesses. (286a-292a)

The People maintain that the defense claim that witness Couch was an accomplice or that the defense theory suggested Couch was an accomplice is not supported by the record. Defendant did not admit to any involvement in the crimes and he did not implicate

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220 (1998).

Couch. Witness Woodrow Couch was never charged and was never implicated by anyone as a participant in the crimes. (167a-169a, 232a-237a) Couch was tested and eliminated as a source for any semen or DNA only after Defendant gave his second statement claiming that he had consensual sex with the victim on the date in issue, claiming that when he left Couch was still there, and claiming that Defendant understood from comments by Couch and the victim that it was then Couch's turn for sex. This statement by Defendant wasn't made until after Defendant's preliminary examination where testimony was presented indicating vaginal, rectal, and oral swabs from the victim had been sent for DNA analysis. (90a-93a, 235a-239a)

Concerns about the credibility of Couch were brought out before the jury through questions about the different statements that he made, as well as questions about his drinking and his whereabouts on the night in issue. (186a-206a) Moreover, although defense counsel in closing suggested that Couch had something to hide, defense counsel in closing did not suggest that Couch was involved in any way. Rather, defense counsel suggested that "some unknown person" went into the victim's residence after Defendant left and after Couch left. The unknown person "got mad" at the victim and "committed this crime." He further suggested that there were other potential culprits - "Walter" or "Pat." (272a-273a)

More importantly, the physical evidence - DNA analysis of vaginal, oral, and rectal swabs from the victim that showed the presence of sperm, implicated Defendant, not Woodrow Couch or

anyone else. (92a-93a, 212a-215a)

Neither the evidence, nor the defense theory, supported an accomplice instruction as to Woodrow Couch. Even if the defense requested an accomplice instruction, the trial court would not necessarily be required to give it under the facts of this case. Thus, it is clear that the trial court did not err in failing to give an accomplice instruction sua sponte.

Moreover, the trial court should not be required under any circumstances to give a cautionary instruction sua sponte - there may well be strategy reasons on the part of the defense for not requesting such an instruction. To the extent *McCoy* suggests it may be reversible error for a trial court to fail to give an accomplice instruction sua sponte, it should be overruled.

McCoy is also faulty in suggesting an accomplice instruction must be given upon request. Rather an instruction should only be given if it is supported by the evidence. And if a requested instruction should have been given, a harmless analysis should be applied.

CONCLUSION

The People maintain that the this Court should clearly extend the waiver doctrine as set forth in *People v Carter* to the situation presented in the instant case. An affirmation or acquiescence to jury instructions as provided by the trial judge waives any right to a direct review of those instructions on appeal. In the present case, the express agreement with jury instructions by indicating the defense found nothing

objectionable in the proposed instructions and had no objections to the instructions as actually presented was an intentional relinquishment of a known right and therefore a waiver of any claim of error in relation to those instructions.

Moreover, to the extent *People v McCoy* suggests that a sua sponte accomplice instruction is required or that the failure to give an accomplice instruction sua sponte may be the basis for reversal, *McCoy* should be overruled. And to the extent *McCoy* suggests reversal is automatic where a requested accomplice instruction is not given, it should be clarified to allow for a harmless error analysis.

Notably, a determination that affirmation or acquiescence to jury instructions constitutes a waiver, does not leave a defendant without a remedy where the instruction is essential to an element or defense. A claim based upon ineffective assistance for not objecting to erroneous instructions or not requesting a particular instruction would preserve any clearly erroneous and prejudicial error in relation to the instructions. Thus, a defendant prejudiced by erroneous instructions would not be left without a remedy.

Alternatively, even under a forfeiture analysis, Defendant has failed to show plain error in the present case where there was no evidence to support a cautionary accomplice instruction and numerous witnesses provided substantial physical and testimonial evidence implicating Defendant.

ARGUMENT III

A finding of ineffective assistance requires proof that counsel's performance fell below an objective standard of reasonableness and that the deficient performance was prejudicial to the Defendant. Defendant's claim of ineffectiveness based upon a failure to request an accomplice instruction has failed to satisfy those requirements because there was no evidence to support the instruction and there was substantial physical and testimonial evidence, apart from that provided by the alleged accomplice, establishing Defendant's guilt.

DEFENDANT'S CLAIM

Defendant's final claim is that he was denied the effective assistance of counsel where counsel failed to request a cautionary instruction on the unreliability of accomplice testimony with respect to the testimony of Woodrow Couch.

STANDARD OF REVIEW COUNTERSTATEMENT

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law - the factual aspect is reviewed for clear error and questions of law are reviewed de novo.[52]

DISCUSSION

A. Requirements for finding ineffective assistance of counsel

Effective assistance of counsel is presumed and a defendant bears the heavy burden of proving otherwise.[53]

Where a defendant has failed to move for a new trial or

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[52] PEOPLE v LEBLANC, 465 Mich 575, 579; 640 NW2d 246 (2002).

[53] STRICKLAND v WASHINGTON, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); PEOPLE v ROCKEY, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Ginther hearing, as in the present case, review is limited to the appellate record.[54]

In order to demonstrate ineffective assistance of counsel, a defendant must establish:

(1) that the attorney's performance fell below an objective standard of reasonableness under prevailing professional norms; and

(2) that the deficiency was so prejudicial that defendant was deprived of a fair trial.[55]

The Court need not determine whether counsel's performance was deficient before examining the prejudice prong of the test where it may be easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.[56]

Moreover, a reviewing court must not overturn convictions because "defense counsel should have chosen other avenues of defense that, although tenable, did not have a reasonable probability of affecting the jury's verdict."[57] Strategy decisions are uniquely within the realm of trial counsel.[58] And counsel is

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[54] PEOPLE v GINTHER, 390 Mich 436, 443; 212 NW2d 922 (1973); PEOPLE v SABIN (ON SECOND REMAND), 242 Mich App 656, 659; 620 NW2d 19 (2000).

[55] PEOPLE v TOMA, 462 Mich 281, 302; 613 NW2d 694 (2000); PEOPLE v LAVEARN, 448 Mich 207, 213-216; 528 NW2d 721 (1995).

[56] See REED, supra, 449 Mich at 400-401 (Boyle, J.) quoting STRICKLAND, supra, 466 US at 697.

[57] See LEBLANC, supra, 465 Mich at 590.

[58] See LEBLANC, supra, 465 Mich at 590; TOMA, supra, 462 Mich at 302; PEOPLE v DANIEL, 207 Mich App 47, 58; 523 NW2d 830 (1994) lv den 450 Mich 979 (1996).

not obligated to make futile objections or requests.[59] As Judge, now Justice, Markman found in writing for the Court of Appeals:

> Trial counsel's failure to request an instruction inapplicable to the facts at bar does not constitute ineffective assistance of counsel.[60]

Although a failure to request an accomplice instruction may in some cases constitute ineffective assistance, it is certainly dependent on the facts of the case. The Mississippi Supreme Court specifically addressing an ineffectiveness claim based upon the failure to request an accomplice instruction has explained:

> [W]hile it is true that, if requested, such an instruction would no doubt have have been given, the failure to request the instruction does not rise to the level of ineffectiveness...this is particularly true where evidence is presented attacking the credibility of the witness.[61]

B. Counsel cannot be found ineffective based upon a failure to request a cautionary accomplice instruction where there was no evidence to support an accomplice claim and there was substantial physical and testimonial evidence establishing Defendant's guilt

In the present case, the only support for the claim that witness Couch was an accomplice is based upon testimony about Defendant's statement to the investigating officer indicating that Couch was at the victim's apartment when Defendant left.

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[59] See PEOPLE v MILSTEAD, 250 Mich App 391, 401; 648 NW2d 648 (2002).

[60] TRUONG (AFTER REMAND), supra, 218 Mich App at 341.

[61] SWINGTON v STATE, 742 So2d 1106, 1117 (Miss 1999) (citation omitted) compare e.g. FREEMAN v CLASS, 95 F3d 639 (CA 8, 1996) (only direct evidence came from accomplice and there was no corroboration, therefore counsel was ineffective in failing to request accomplice instruction).

Notably, Defendant neither admitted to any knowledge of or involvement in any of the crimes, nor did he accuse Couch of committing the crimes. (166a-169a, 235a-239a) Thus, as discussed under Argument II, no accomplice instruction was warranted even upon request. Defense counsel was not required to make an inapplicable or futile request. Alternatively, he may have chosen as a matter of strategy not to make such a request because the instruction would suggest that the witness participated with Defendant and thus it would implicate the Defendant. The issue of Couch's credibility was brought out and the instructions on witness credibility in general gave the jury the opportunity to consider the problems with Couch's testimony. Thus, trial counsel was not ineffective in his representation and Defendant has failed to show any prejudice.

CONCLUSION

Counsel's performance did not fall below an objective standard of reasonableness were there was little if any evidence to support the defense claim on appeal that witness Couch could be considered an accomplice. Moreover, even if witness Couch could have been characterized as a possible accomplice, the representation of counsel did not so prejudice Defendant as to deprive him of a fair trial when the jury heard evidence suggesting he was not credible, other witnesses corroborated the testimony of witness Couch, and the physical evidence clearly implicated only Defendant. Therefore, Defendant's claim of ineffective assistance is simply without merit.

Defendant's conviction and the decision of the Court of Appeals on this issue should be affirmed.

RELIEF

For all of the reasons set forth under each specific argument the People maintain that Defendant has failed to establish any basis for relief. The Court of Appeals properly reviewed Defendant's claims and properly affirmed Defendant's convictions and sentence.

The People respectfully request that this Honorable Court affirm Defendant's convictions.

Respectfully submitted,

MICHAEL D. THOMAS (P23539)
PROSECUTING ATTORNEY

March 31, 2003

JANET M. BOES (P37714)
ASSISTANT PROSECUTING ATTORNEY
Saginaw County Prosecutor's Office
Courthouse
Saginaw, MI 48602
(989) 790-5330

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: H. Gage, M. Cavanagh, K. Wilder

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	Supreme Court No. 120363
-vs-	Court of Appeals No. 220715
DANIEL JESSE GONZALEZ, Defendant-Appellant.	Saginaw Circuit Court No. 98-015361-FC

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF SAGINAW)

MARIA A. SIAN, being sworn, states that on March 31, 2003, she mailed by UPS Next Day Air - Mail Service, the original plus twenty-four (24) copies of Appellee's Brief on Appeal - Oral Argument Requested and Appendix, together with Proof of Service, to the Michigan Supreme Court Clerk; one copy to Michigan Court of Appeals, 925 W. Ottawa St., P.O. Box 30022, Lansing, MI 48909-7522; one copy to Saginaw County Circuit Court Clerk, 111 S. Michigan Ave., Saginaw, MI 48602; two copies to attorney for Defendant-Appellant, Susan M. Meinberg, Assistant Defender, State Appellate Defender Office, 3300 Penobscot Building, Detroit, MI 48226, and one copy to the Attorney General Office, Prosecuting Attorneys Appellate Service, Attn. Charles Hackney, Assistant in Charge, Samuel D. Ingham Bldg., 116 W. Ottawa St., Ste. 600, Lansing, MI 48913, by placing the documents in the United States mail, properly addressed, with first-class postage fully paid.

Dated: March 31, 2003

MARIA A. SIAN

Subscribed and sworn to before me
on March 31, 2003.

BETH A. BAUER, Notary Public
Saginaw County, Michigan
My Commission Expires: April 10, 2003